CUMULATIVE DIGEST

CH. 5
ATTEMPT

(Attempt decisions are also contained in the various substantive offense chapters.)

§5

People v. Bell, 2012 IL App (5th) 100276 (No. 5-10-0276, 5/3/12)

1. Defendant was charged with attempted possession of anhydrous ammonia under 720 ILCS 646/25(a)(1). Section 646/25(a)(1) defines the offense as "knowingly attempt[ing] to engage in the possession of anhydrous ammonia with the intent that the anhydrous ammonia be used to manufacture methamphetamine." At trial, the court gave a non-IPI instruction which defined the offense in terms of the statute. However, the trial judge declined to give IPI Crim. No. 6.05, which states the general definition of attempt, including that the act in question must constitute a "substantial step" toward commission of the offense.

The Appellate Court found that the trial judge erred by refusing to give IPI Crim. No. 6.05. Even where a statute contains a specific definition of an attempt offense, Illinois case law provides that the elements of the offense include the commission of a "substantial step" toward the crime. Otherwise, mere preparation to commit a crime would constitute an attempt. Thus, the trial court should have given IPI Crim. No. 6.05 in addition to the statutory definition of attempt possession of anhydrous ammonia.

2. The defense failed to object to the omission of IPI Crim. No. 6.05, and failed to raise the issue in the post-trial motion. The court concluded that the failure to give IPI Crim. No. 6.05 was not plain error.

The erroneous omission of a jury instruction constitutes plain error under the second prong of the plain error standard only if there is a serious risk that the jury convicted the defendant because it did not understand the applicable law. That standard was not satisfied here, where the essential disputed issue was whether the defendant was accountable for the actions of the principal, and not whether the actions of the principal constituted a substantial step toward the offense of attempting to possess anhydrous ammonia. Because the jury was correctly instructed concerning accountability, and because the evidence of a "substantial act" by the principal was overwhelming and undisputed, there is no danger that the jury convicted the defendant due to the absence of an instruction that a "substantial step" is an element of the offense. Because plain error did not occur, defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Bob Burke, Mt. Vernon.)

People v. Lipscomb-Bey, 2012 IL App (2d) 110187 (No. 2-11-0187, 12/28/12)

The elements of an attempt crime are the intent to commit a specific offense and an act that constitutes a substantial step toward the commission of the offense. What constitutes a substantial step is determined by each case's unique facts and circumstances. Mere preparation is not enough. The act must not be too far removed in time and space from the conduct that constitutes the principal offense. A substantial step occurs when the act puts the defendant in dangerous proximity to success.

A person commits the offense of armed habitual criminal if he receives, sells, possesses,

or transfers any firearm and has certain requisite prior convictions. The State did not prove that defendant took a substantial step toward the commission of that offense. Defendant showed up to negotiate the terms of the sale of a firearm, but the basic terms of the sale such as price and type of gun still had to be negotiated, and a separate encounter would have been necessary to actually transfer the gun as defendant had no gun in his possession. Defendant was not in dangerous proximity to success given that many essentials remained before a sale could occur.

(Defendant was represented by Assistant Defender Steve Wiltgen, Elgin.)

People v. Oduwole, 2013 IL App (5th) 120039 (No. 5-12-0039, 3/6/13)

1. To convict defendant of the inchoate offense of attempt, the prosecution must prove that he took a substantial step toward the commission of an offense, with the intent to commit that offense. What constitutes a substantial step must be determined on a case-by-case basis. There must be an act or acts toward the commission of the principal offense, and the act or acts must not be too far removed in time and space from the conduct that constitutes the principal offense.

A defendant does not have to complete the last proximate act to the actual commission of the principal offense, but mere preparation is not enough. The acts taken in furtherance of the offense must place the defendant in dangerous proximity to success.

Under the Model Penal Code, possessing materials to be used in the commission of an offense can be sufficient to support an attempt conviction if the materials are specifically designed for an unlawful purpose or can serve no lawful purpose under the circumstances.

2. Defendant, a college student, was convicted of attempting to make a terrorist threat. A licensed gun dealer notified the authorities that defendant had asked him to act as the transfer agent for firearms that defendant had purchased over the internet. The dealer's concern was that defendant might be a straw purchaser. The police then found a piece of paper partially protruding from under the center console of defendant's locked car, on which defendant had written that a "murderous rampage similar to the VR shooting" would occur at another university if $50,000 did not reach a paypal in the next seven days, and that "THIS IS NOT A JOKE!"

In a search of defendant's campus apartment, the police also found notebooks of rap lyrics using the same symbols and words found on the piece of paper, a .25 caliber pistol, and a computer. Microsoft Movie Maker had been removed from the computer's hard drive. Defendant also had a PayPal account in the name of Jeff Robinson.

3. The court reversed defendant's conviction because the State failed to prove that defendant took a substantial step toward the commission of the offense of making a terrorist threat. The writing found in defendant's car was not visible to anyone looking inside the vehicle and there was no evidence that the defendant was going to disseminate the writing. The Movie Maker file had been removed from the computer prior to defendant's arrest. PayPal accounts and Movie Maker files are not materials specifically designed for an unlawful purpose. The evidence demonstrates, at best, preparatory activities that were consistent with a variety of scenarios, and did not prove defendant was in dangerous proximity to success.

People v. Sweigart, 2013 IL App (2d) 110885 (No. 2-11-0885, 3/27/13)

A person is guilty of attempt when with intent to commit a specific offense, he does any act that constitutes a substantial step toward the commission of that offense. 720 ILCS 5/8-4(a). Defendant need not have completed the last proximate act to the actual commission of a crime, and his subsequent abandonment of his criminal purpose is no defense. Mere

preparation is not enough.

The modern rule, as expressed in the Model Penal Code, is to place emphasis on the nature of the steps taken, rather than what remains to be done. The maxim that an attempt must bring defendant in "dangerous proximity" to success in carrying out his intent is not wholly inconsistent with the modern rule in that a substantial step is required and mere preparation is not enough. But by shifting emphasis from what remains to be done to what the actor has already done, the Model Penal Code standards enable a trier to fact to find a substantial step even where the commission of the crime still requires several major steps to be taken. But a substantial step can be found only where there is "clearly specific conduct which can only be directed at the specific identified victim or crime if 'strongly corroborative of the actor's criminal purpose.'"

Under any of these standards, the State proved defendant guilty of child abduction by attempting to lure a child to his home from a grocery store without the consent of the parent for other than a lawful purpose. 720 ILCS 5/10-5(b)(10). Defendant approached a child near the exit of a store and asked the child if he wanted to come to defendant's home. Defendant's van was parked in the parking lot but was easily accessible. The child's family was nearby, but they were not in earshot. Defendant could have successfully abducted the child if the child had agreed to accompany defendant. Additionally, defendant quickly left the scene when the child refused and the child's sister approached, he lied to the police about where he spoke to the child in the store, and the police recovered weapons, child's toys, lingerie, wigs, and sex toys, including restraint devices, from the trunk of defendant's car.

(Defendant was represented by Supervisor Josette Skelnik, Elgin.)

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